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Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

Application of

ECHOSTAR COMMUNICATIONS CORPORATION,
 GENERAL MOTORS CORPORATION, AND
 HUGHES ELECTRONICS CORPORATION,

Transferors,

and

ECHOSTAR COMMUNICATIONS CORPORATION,

Transferee.

***EXPEDITED ACTION
 REQUESTED***

CS Docket No. 01-348

Application of

ECHOSTAR SATELLITE CORPORATION
 AND HUGHES ELECTRONICS CORPORATION

for Authority to Launch and Operate
 NEW EHOSTAR 1 (USABBS-16)

CS Docket No. 01-348
 File No. SAT-LOA-20020225-00023
 S2435

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To: The Commission

PETITION FOR SUSPENSION OF HEARING

EchoStar Communications Corporation ("Echostar"), General Motors
 Corporation ("GM"), and Hughes Electronics Corporation ("Hughes") (collectively,
 "Applicants"), hereby petition the Commission, pursuant to paragraph 295 of the Commission's

Hearing Designation Order’ to suspend the hearing in this matter pending review of an amended application submitted by the Applicants concurrently with this suspension request. The *HDO* designated the Applicants’ initial merger application for hearing after the Commission determined that “the record . . . compiled thus far . . . prevent[ed] [the Commission] from making a determination that the grant of the application will serve the public interest, convenience and necessity.”² However, the *HDO* explicitly gave Applicants the option, within **30** days of the mailing of the *HDO*,³ to “file an amended application with the Commission to ameliorate the competition concerns identified in [the *HDO*],” and also “file a petition to suspend the hearing pending [Commission] review of the amended application.”⁴

The Applicants are today filing **an** ameliorative amended application. As explained in that amendment, the Applicants’ remedy proposal is more than sufficient to resolve the competition concerns identified by the Commission. Therefore, a hearing on the amended application is unnecessary because the proposed remedy will cure these concerns even assuming the worst set of facts – *i.e.*, even if one views the concerns identified in the *HDO* in the least favorable light for the Applicants. The Commission should thus suspend the hearing for the

¹ *In the Matter of Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation, Transferors, and EchoStar Communications Corporation, Transferee*, Hearing Designation Order, CS Docket No. 01-348, FCC No. 02-284 (rel. Oct. 18, 2002) (“*Hearing Designation Order*” or “*HDO*”).

² *HDO*, ¶ 289. The Commission also designated for hearing the joint Application submitted by EchoStar and Hughes **to** launch and operate NEW ECHOSTAR 1, a direct broadcast satellite that would be located at the 110° W.L. orbital location and would ultimately enable the merged company to provide local service to all Designated Market Areas in the United States. *Id.* (“Issue 4”). As this satellite application was filed subject to, and contingent upon approval of the merger application, *see id.* ¶ 2, a hearing on the satellite application should also be suspended while the Commission considers the amended merger application.

³ The public version of the *HDO* was postmarked on October 28, 2002.

⁴ *Id.* ¶ 295.

purpose of evaluating the Applicants' remedy proposal. If the Commission's evaluation results in a conclusion that the Applicants are correct and that the proposed remedy truly ameliorates the competition concerns identified in the *HDO*, this conclusion will obviate the need for a hearing in this proceeding. This will in turn conserve both the Commission's and the parties' resources, allow a Commission decision well before the relevant trigger dates for termination of the merger agreement, and increase the likelihood that the merger as modified will be consummated, resulting in significant consumer benefits. The Agreement and Plan of Merger between EchoStar and Hughes contains several termination provisions, including, among other things, provisions that permit Hughes to terminate the transaction under certain circumstances if Commission approval is not received on or before January 6, 2003, or if the merger is not consummated by January 21, 2003. Accordingly, the parties urgently need Commission resolution before the effective termination trigger dates; only expedited action can secure meaningful relief for the parties, and for consumers.

The Applicants request that the Commission place this petition along with the amended application on public notice for comment, and promptly suspend the hearing proceeding. This should permit a decision on whether to grant the application as amended without a hearing and well in advance of any contract termination trigger dates.

The Applicants furthermore request that during the pendency of the hearing suspension and Commission consideration of the amended application requested herein, this proceeding be conducted in accordance with the provisions of Commission Rule 1.1206 governing non-restricted, "permit-hut-disclose" proceedings. *See* 47 C.F.R. § 1.1206. The Commission has discretion under its *ex parte* rules to modify the status of proceedings "[w]here the public interest so requires in a particular proceeding." 47 C.F.R. § 1.1200(a). The

Commission has already exercised this discretion in this proceeding by according permit-but-disclose status to the Applicants' initial application. Here, as with the initial application, permit-but-disclose status will facilitate the opening of efficient lines of communication with the Commission, which will aid the Commission in reaching **an** expeditious decision on the amended application.

I. THE HEARING SHOULD BE SUSPENDED WHILE THE COMMISSION CONSIDERS THE AMENDED APPLICATION

The Commission has previously suspended or deferred hearings on license transfer applications where new developments or changed circumstances militated in favor of postponing the hearing process to give the Commission and the parties an opportunity to assess the effects of the new developments upon the application.⁵ Such was the case in recent hearing designation orders concerning radio station applications that included hearing suspension clauses similar to the suspension clause in the instant *HDO*. Significantly, suspension of the hearing was granted in each of the radio cases.⁶

⁵ The Commission has also suspended the effectiveness of its orders in other contexts where warranted by changed circumstances. For example, a must carry order was stayed by the Cable Services Bureau where a party asserted that the facts underlying the order – specifically, those concerning the station's ability to provide a good quality signal – had changed just before the Bureau released its order. *See Rancho Palos Verdes Broadcasters, Inc. v. Mediacom Communications Corp.*, 16 FCC Rcd. 18499 (Cable Services Bur. 2001). In another recent case, the Wireless Telecommunications Bureau stayed the effectiveness of a rule designed to address problems with certain types of wireless handsets while it considered an ameliorative solution that had not been considered during the rulemaking. *In the Matter of Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, RM-8143, DA 02-2423, 2002 FCC LEXIS 4899 (Wireless Telecommunications Bur. rel. Sept. 30, 2002).

⁶ *See In the Matter of the Application of Hilco Communications, Assignor, and Cumulus Licensing Corp., Assignee, for Consent to Assignment of License of KAYD-FM, Silsbee, Texas*, Hearing Designation Order, MB Docket No. 02-236, FCC 02-236, 2002 FCC LEXIS 4343 (rel. Sept. 5, 2002); *In the Matter of The Application of Voice in the Wilderness Broadcasting, Inc., Assignor, and Clear Channel Broadcasting Licenses, Inc., Assignee; For Consent to Assignment*

In *Hilco*, *Voice in the Wilderness*, and *Air Virginia*, the Commission was unable to find that grant of the transfer applications served the public interest and designated each application for hearing. The applicants were, however, given an opportunity in their respective hearing designation orders to amend their applications or file “such other information with the Media Bureau as they deem relevant to ameliorate the competition concerns identified.”⁷ At the same time, the Commission recognized that while consideration of these applications was governed by an interim policy announced in a Notice of Proposed Rulemaking on local radio ownership, the outcome of the cases might be affected by the ultimate resolution of policy issues being considered in the still pending rulemaking.⁸ Accordingly, the Commission provided each applicant with the option of deferring its hearing pending resolution of the rulemaking, consistent with a policy the Commission had adopted to ensure that applicants could have their applications evaluated under its final rules, rather than the interim rule.⁹ All of the applicants in *Hilco*, *Voice in the Wilderness*, and *Air Virginia* sought deferral, and the requests were granted in every instance.¹⁰

¶ License of KCOL-FM, Groves, Texas, Hearing Designation Order, MB Docket No. 02-272; FCC 02-246, 2002 FCC Lexis 4342 (rel. Sept. 5, 2002); *In the Matter of Application of Air Virginia*, 17 FCC Rcd. 5423 (2002) (Hearing Designation Order).

⁷ See *Hilco*, 2002 FCC LEXIS 4343 at *50, ¶ 51; *Voice in the Wilderness*, 2002 FCC LEXIS 4342 at *50-51, ¶ 52; *Air Virginia*, 17 FCC Rcd. 5423, 158.

⁸ See *Hilco*, 2002 FCC LEXIS 4343 at *50, ¶ 51; *Voice in the Wilderness*, 2002 FCC LEXIS 4342 at *50-51, ¶ 52; *Air Virginia*, 17 FCC Rcd. 5423, ¶ 58.

⁹ See *In the Matter of Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; Definition of Radio Markets*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 16 FCC Rcd. 19861 (2001), at ¶¶ 87-88.

¹⁰ See *In the Matter of Hilco Communications, Inc.*, Order, MB Docket No. 02-236, FCC 02M-90 (rel. Sept. 30, 2002) (ALJ deferring all hearing proceedings); *In the Matter of Voice in the Wilderness*, MB Docket No. 02-272, FCC 02M-91 (rel. Sept. 30, 2002) (ALJ deferring all

Here, as in the radio transfer cases, the Commission has invited the Applicants to seek postponement of the hearing because of an anticipated change in circumstances. The initial merger application submitted by the Applicants has been amended with a proposed remedy that ameliorates the competition concerns cited by the Commission in designating the initial application for hearing. In light of this development, practicality and reason counsel that the Commission and parties not be required to expend resources to participate in a potentially complex and expensive hearing that may not be necessary, since the Commission may agree with the Applicants that the amended application resolves the Commission's concerns.

Thus, the more efficient course, and the course specifically contemplated by the Commission in the *Hearing Designation Order*, is for hearing proceedings to be suspended while the Commission considers and arrives at a decision regarding the amended application. This is the course the Commission wisely followed in other cases where new developments or changed circumstances would potentially affect the outcome of the proceeding. The Commission should follow the same course here.

II. SUSPENSION OF THE HEARING IS ALSO WARRANTED UNDER THE STANDARDS SET FORTH IN CASE LAW GOVERNING ADMINISTRATIVE STAYS

In the Applicants' view, the decisions in the radio transfer cases, as well as practicality and reason, provide ample justification for suspending the hearing ordered in the instant proceeding. Applicants note, however, that suspension of the hearing would also be warranted under the four principles generally cited by courts and the Commission in determining whether to grant a stay of administrative action. As the Commission has observed, the well-

hearing proceedings); *In the Matter of Air Virginia, Inc.*, MM Docket No. **02-38**, FCC 02M-28 (rel. Apr. 15, 2002) (ALJ deferring all hearing proceedings).

established standard for stay of administrative action is articulated in *Virginia Petroleum Jobbers Ass'n v. FPC*¹¹ and consists of the following factors:

(1) a likelihood of success on the merits; (2) the threat of irreparable harm absent the grant of preliminary relief; (3) the degree of injury to other parties if relief is granted; and (4) that the interests of the [stay] order will further the public interest.¹²

The Commission has explained further that these four factors are to be balanced on a case-by-case basis, and that there is no requirement that there be a showing as to each single factor.¹³ In addition, if there is a particularly overwhelming showing as to at least one of the factors, the Commission has opined that it “may find that a stay is warranted notwithstanding the absence of another one of the factors.”¹⁴

As to the first factor, courts have explained that a demonstration of likely success on the merits does not mean the Applicants must prove that “ultimate success . . . is a mathematical probability”¹⁵ particularly where, as is the case here, the other factors also weigh heavily in favor of a stay. Instead, Applicants must simply make a “substantial case” on the merits.¹⁶ Here, the Applicants have filed concurrently with this Petition an amended application that satisfies the first prong of the *Virginia Petroleum Jobbers* test and ameliorates the concerns

¹¹ 259 F.2d 921 (D.C. Cir. 1958).

¹² *In the Matter of Biennial Regulatory Review – Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission’s Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services*, 14 FCC Red. 9305 (1999), at ¶ 4 (citing *Virginia Petroleum Jobbers*).

¹³ *Id.*

¹⁴ *Id.* (citation omitted); see also *Washington Metropolitan Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

¹⁵ *Holiday Tours*, 559 F.2d at 843.

¹⁶ *Id.*

identified by the Commission in the *HDO* even if one views these concerns in the light least favorable to the Applicants. This amended application is incorporated by reference herein. Accordingly, the Applicants have not only presented the Commission with a “substantial case” on the merits, Applicants have demonstrated a likelihood of prevailing on the merits by resolving the concerns cited by the Commission in the *HDO*.

As to the second factor, Applicants as well as the public stand to suffer great and certain irreparable harm in the absence of a hearing suspension. Any delay of a possible Commission decision granting the amended merger application beyond the contract termination trigger dates would create the high risk that one of the parties will elect to terminate the merger agreement. If that is allowed to occur, it will mean that the public will irretrievably forego the benefits of this transaction.¹⁷ Termination will specifically frustrate the opportunity of the Commission to find that the amendment to the application cures all of the competition concerns identified in the *HDO*. Conversely, suspension of the hearing and prompt grant of the amended application will increase the likelihood that the merger will be consummated if found by the Commission to be in the public interest.

With regard to the third factor, suspension of the hearing will not harm other interested parties or the public. The Applicants seek only to maintain the status quo, remaining separate companies, while the Commission considers the amended application. Of course, none of the purported harms claimed by the merger opponents can come to pass while the status quo is maintained. Moreover, courts have recognized the wisdom of such an approach, observing that “[a]n order maintaining the status quo is appropriate when a serious legal question is presented,

¹⁷ Courts have explained that harm is “irreparable” where, for example, it would destroy a business. *See Holiday Tours*, 559 F.2d at 843.

when little if any harm will befall other interested persons or the public and when denial of the [stay] order would inflict irreparable injury on the movant.””

Finally, as mentioned above, grant of this Petition will serve the public interest by avoiding the risk of termination of the merger agreement and preserving the opportunity of the public to enjoy the benefits of the merger if the Commission finds it to be in the public interest. It will also serve the public interest by promoting efficient use of scarce public resources. As explained above, it would be a waste of the Commission’s resources to proceed with a hearing that would be rendered unnecessary if the Commission agrees with the Applicants that the proposed remedy solves its competition concerns. Of course, this is precisely why the Commission explicitly afforded the Applicants an opportunity to request suspension of the hearing in the first instance – so that the Commission and the parties need not proceed unnecessarily with a hearing while it considers the remedial benefits of an amended application. The public also has an interest in “having legal questions decided on the merits, as correctly and expeditiously as possible,”¹⁹ and this interest will be promoted by suspending the hearing while the Commission expeditiously considers the amended application.

In sum, Applicants have demonstrated: the likelihood of success on the merits by proffering an amended application that addresses the competition concerns expressed by the Commission in the *Hearing Designation Order*; that Applicants will suffer irreparable harm in the absence of a hearing suspension; the absence of any harm to other parties and the public; and the public’s interest in a correct, efficient and expeditious decision on the Applicants’ ameliorative proposal, and in avoiding the risk of termination of the merger agreement prior to

¹⁸ *Id.* at 844.

¹⁹ *Id.* at 843.

Commission action. As all four of the *Virginia Petroleum Jobbers* factors weigh in favor of the Applicants' suspension request, the Commission should suspend the hearing pending its decision on the amended application.

III. CONCLUSION

For all of the foregoing reasons, the Applicants respectfully petition the Commission to suspend the hearing in this matter pending its review of the amended application submitted by the Applicants concurrently with this suspension request.

Respectfully submitted,

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November 27, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of November 2002, a copy of the foregoing was sent by first-class mail (or by hand delivery as indicated by asterisk) to the following:

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